



U.S. Department of Commerce

Federal Advisory Committee Act Overview

Census Scientific Advisory Committee Members

Office of the Assistant General Counsel for Administration
General Law Division
April 2015



Our Office

Acting Assistant General Counsel for
Administration
Rafael Madan

Ethics Law and
Programs Division
David Maggi, Chief

General Law Division
Angelia Talbert-Duarte,
Deputy Chief

Employment and Labor
Law Division
Brian DiGiacomo, Chief

<http://www.commerce.gov/os/ogc/general-law-division>

202-482-5391



FACA Background

- Enacted 1972 – is a public access statute like the Freedom of Information Act (FOIA)
- Revised in 1976 – with passage of the Government in the Sunshine Act
- Governs about 1,000 Federal committees – 60+ in the Department alone. Of these, Census has 3
- General Services Administration (GSA) administers Government-wide



FACA's Purpose

- Ensures that advice provided by committees to the Government is objective and deliberations are accessible to the public
- Formalizes the process for establishing, operating, overseeing, and terminating advisory groups
- Guards against wasteful spending on unnecessary or duplicative groups



Groups to Which FACA Applies

- Any group whose membership includes at least one non-Federal official and which has been established or utilized by the Government to obtain consensus advice
- The key to “utilized” is “actual management or control;” consider:
 - Control of membership or composition
 - Management or control of agenda
 - Calling meetings
 - Participation in development of group’s final product



Groups to Which FACA *Does Not Apply*

- Groups of all Federal employees
 - Individual advice
 - Exchange of facts or information
 - Statutorily exempt
 - Bi-national or multi-national commissions
 - Groups consisting of all Government members (Federal, State, local, foreign, regional, tribal) discussing cross-jurisdictional matters
 - Groups the agency does not manage or control
 - Contract advice
 - Groups that do not advise the agency
-



Statutory & Regulatory Requirements

- Committees are established by legislation, Presidential directive, or formal agency decision
- Charter (renewed every 2 years)
- Plan for Balanced Membership
- Open meetings reasonably accessible to the public
- Meetings announced in the Federal Register (15 days)
- Record retention for the life of the committee
- Documents and minutes available to the public
- Designated Federal Officer (DFO) approves/calls, attends, adjourns meetings; sets agenda
- Annual reporting to GSA



Closing a Meeting / Withholding Documents

- Meetings may be closed (partially or fully) if:
 - Agency determines that a Government in the Sunshine Act exemption applies
 - Notice of Determination (NOD) is published in Federal Register (15 days)
- Committee documents/minutes may only be withheld from public access if exempt from disclosure under FOIA (presumes meeting was closed)
 - Cannot compel requester to use agency FOIA process to obtain access



Open Meeting Exceptions

- (c)(1) Classified information
- (c)(2) Internal personnel rules and practices
- (c)(3) Exempted from disclosure by statute
- (c)(4) Trade secrets; confidential commercial/financial information
- (c)(5) Involves accusing a person of a crime or formally censuring a person
- (c)(6) Personal privacy information
- (c)(7) Law enforcement records
- (c)(8) Information on a financial institution used by its regulating agency
- (c)(9) Financial speculation; Financial institution stability; Frustrate implementation of proposed agency action
- (c)(10) Concerns agency issuance of subpoena or participation in civil action



Potential Consequences of Statutory Noncompliance

Examples:

- Claimant may seek injunction to order opening of meeting
- Claimant can seek court order compelling disclosure of documents
- Claimant can seek injunction to prevent agency from utilizing committee recommendation(s)



Things to Avoid

- Activities exceeding scope of charter
- Committees making Government decisions
(*Committees advise, they don't decide*)
- Grass-roots Lobbying and Publicity and Propaganda
- Inviting non-members to closed or non-public meetings
- Inviting members to exclusive non-committee events
- Unusual timing of appointments
- Disclosing internal Government materials to committees



Role of the General Law Division

- Advise program officials on the applicability of FACA and the establishment of committees
- Review new and renewal charters
- Review membership appointments and reappointments
- Review NODs required to close meetings
- Assist in defending the Department in litigation
- Provide on-going legal advice to DFOs and others



GLD Attorney Assignments for Census Committees*

Committee	Attorney	Phone
Census Scientific Advisory Committee	Hector Benitez-Solivan	202-482-4724
Race, Ethnic, and Other Populations	Malcolm Orr	202-482-2138

General Law Division Main Line
202-482-5391

<http://www.commerce.gov/os/ogc/general-law-division>

*Committees are periodically reassigned.